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## Recommendation

of the European Ombudsman in joint cases  
488/2018/KR and 514/2018/KR on the European  
Commission's appointment of a new Secretary-  
General

Made in accordance with Article 3(6) of the Statute of the European Ombudsman<sup>1</sup>

## Summary

Following two complaints to her office, the Ombudsman conducted an inquiry into how Mr Martin Selmayr, the then Head of Cabinet<sup>2</sup> of the President of the European Commission, was appointed Secretary-General of the Commission in February 2018.

The outgoing Secretary-General, Mr Italianer, who had indicated his intention to retire to President Juncker in 2018 when he was first appointed in 2015, was replaced by Mr Selmayr without a competition and without any formal consideration of other candidates. As the vacancy was not published, no other candidates could apply.

This was not unprecedented. However in order to be fully eligible for such a direct reassignment, Mr Selmayr first had to apply to become Deputy Secretary-General. Such a position became vacant in January 2018, shortly after the then Secretary-General had confirmed to the Commission President his decision to retire in March 2018. This information was known at that time only by the President and by Mr Selmayr.

Mr Selmayr and another member of the Cabinet were the only two applicants for Deputy Secretary-General. The other member withdrew before the process was completed. Preparatory steps for appointing Mr Selmayr as Secretary-General were already being taken one day before

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<sup>1</sup> Decision of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of Ombudsman's duties (94/262/ECSC, EC, Euratom), OJ 1994 L 113, p. 15.  
<sup>2</sup> The French term "Cabinet" is frequently used to describe the private offices of Commissioners.



the formal completion of the selection process for Deputy Secretary-General.

On Wednesday, 21 February 2018, the College of Commissioners approved the appointment of Mr Selmayr first as Deputy Secretary-General and then his reassignment as Secretary-General just minutes later, following the announcement during the meeting that the then Secretary-General would step down in March. The retirement of Mr Italianer had not been on the agenda.

Based on the inspection of Commission documents, the Ombudsman inquiry has identified several issues of concern:

- Mr Selmayr did not recuse himself in January 2018 from the decision-making that led to the creation of the vacancy, and the approval of the vacancy notice, for the post of Deputy Secretary-General, despite the fact that it is highly likely he knew that he would apply for the post and later did so.
- At that point Mr Selmayr had to recuse himself from taking part in the Consultative Committee on Appointments (CCA), which interviews and gives an opinion on the merits of candidates. However, contrary to the applicable binding rules, no replacement was appointed.
- Documentary evidence of the sequencing of events shows that the Deputy Secretary-General appointment procedure was not undertaken to fill that post, but rather to make Mr Selmayr eligible for his immediate reassignment as the new Secretary-General.
- When valid concerns were raised in relation to how the surprise double-appointments were made, the Commission reacted in an evasive, defensive and legalistic manner, which served further to increase concerns.

The European Parliament debated the issue and passed a resolution in plenary on 18 April 2018. Given the facts of the inquiry, the Ombudsman agrees with its assessment that the affair damaged trust in EU institutions and that the double-appointments "*stretched and possibly even overstretched the limits of the law*".

Based on her inquiry, the Ombudsman now recommends that the Commission develop a specific appointment procedure for Secretary-General, separate from the procedure for other senior appointments.



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## 1) Background

- 1.** The inquiry concerns the manner in which the European Commission, on 21 February 2018, appointed Mr Martin Selmayr, the then Head of the private office ("Cabinet") of the President of the Commission, as its new Secretary-General. While Cabinet positions are often in practice more influential than roles in the Commission's civil service, given that Cabinet members speak for the Commissioner, they are by their nature temporary. The position of Secretary-General is the most important "*permanent*" position in the EU civil service. Decisions to appoint senior managers in the civil service are taken by the College of Commissioners, which is composed of one Commissioner from each EU Member State.
- 2.** At 8:39 on **Wednesday 21 February 2018**, Mr Alexander Italianer, who had been Secretary-General of the Commission since 1 September 2015, and who had indicated at that time to the President his intention to retire in 2018, sent a letter to the President stating that he wished to step down as Secretary-General on 1 March 2018, and to retire as an EU civil servant by the end of March 2018.
- 3.** Just under one hour later, at 9:35, the weekly meeting of the College of Commissioners began. On the agenda was a series of proposed appointments of "*senior managers*" for approval, one of which concerned Mr Selmayr. The College agreed that he be appointed to the post of Deputy Secretary-General. Mr Italianer then informed the College that he would step down as Secretary-General on 1 March and retire on 31 March 2018. This information had not been included on the agenda. The President then proposed that Mr Selmayr replace Mr Italianer as Secretary-General, with effect from 1 March 2018. None of the Commissioners is recorded as having objected to this proposal. On 1 March 2018, Mr Selmayr became Secretary-General<sup>3</sup>.
- 4.** Concerns about this appointment were raised, attracting widespread negative comment. The European Parliament debated the appointment in plenary on 12 March 2018<sup>4</sup> and subsequently asked its Committee on Budgetary Control to examine the matter.
- 5.** On 20 March 2018, the Committee sent an extensive questionnaire to the Commission. The Commission replied on 25 March 2018. On 27 March 2018, the Committee held a hearing with the Commissioner for Human Resources, Mr Oettinger. On 28 March 2018, the Committee sent a second extensive questionnaire to the Commission, which replied on 4 April 2018<sup>5</sup>.
- 6.** The European Ombudsman had meanwhile received complaints about the appointment. On 26 March 2018, the Ombudsman stated that she intended to

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<sup>3</sup> Minutes of the 2244th meeting of the Commission, PV (2018) 2244 final, pp. 17 - 29, available here: <http://ec.europa.eu/transparency/regdoc/rep/10061/2018/EN/PV-2018-2244-F1-EN-MAIN-PART-1.PDF>.

<sup>4</sup> The debate of 12 March 2018 on the 'Integrity policy of the Commission, in particular the appointment of the Secretary-General of the European Commission', is available here: <http://www.europarl.europa.eu/plenary/en/debate-details.html?date=20180312&detailBy=date>.

<sup>5</sup> Details on Parliament's investigation are available here: <http://www.europarl.europa.eu/committees/en/cont/subject-files.html?id=20180326CDT02181>.



await the work of Parliament's Committee on Budgetary Control before inquiring into the matter.

**7.** On 18 April 2018, Parliament adopted a Resolution on the appointment of Mr Selmayr as Secretary-General<sup>6</sup>. This identified a number of specific concerns relating to the appointment and characterised it as a "*coup-like action which stretched and possibly even overstretched the limits of the law*". Parliament also called on the Ombudsman to "*inform the Commission and the Parliament of her views and of any possible instances of maladministration she has discovered which would need to be followed up*".

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<sup>6</sup> European Parliament resolution of 18 April 2018 on the integrity policy of the Commission, in particular the appointment of the Secretary-General of the European Commission, P8\_TA-PROV(2018)0117, available here: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2018-0117&language=EN&ring=B8-2018-0214>



## 2) Timeline

	Deputy Secretary-General (DSG)	Secretary-General (SG)
September 2015		New SG Mr Italianer indicates to President Juncker he intends to retire soon after March 2018.
Second half of 2017/Early 2018		Discussions <sup>7</sup> on his succession take place between him, the President and Mr Selmayr <sup>8</sup> .
Early 2018		Mr Italianer confirms he will retire <sup>9</sup> . Transfer of Mr Selmayr to position of SG becomes " <i>one possible option</i> " <sup>10</sup> .
11-12 Jan 2018		Evidence suggests <sup>11</sup> that President Juncker encouraged Mr Selmayr to "work towards" the option of assuming the responsibility of SG.
At or before 24 Jan 2018	The President agrees, via his Cabinet, that a current DSG (Ms Michou) will move from her post, thus rendering as of 1 March 2018 her post vacant.	
24 Jan 2018	Draft vacancy notice for DSG is prepared.	
Before 31 Jan 2018	The President, via his Cabinet, approves the vacancy notice.	
Wednesday, 31 Jan 2018	The College of Commissioners transfers Ms Michou and launches a vacancy procedure.	

<sup>7</sup> Answer to Parliament, Question 11, 4 April 2018.

<sup>8</sup> Answer to Parliament, Question 20, 4 April 2018.

<sup>9</sup> Answer to Parliament, Question 32, 24 March 2018.

<sup>10</sup> Answer to Parliament, Question 11, 4 April 2018.

<sup>11</sup> The Belgian newspaper *Le Soir* interviewed Mr Selmayr on the afternoon of 21 February 2018 and quotes the following statement (which was later on reportedly confirmed in an email exchange with the Commission Spokeperson's Service) : « Juncker m'a dit avant Noël qu'il allait falloir y aller, il m'a dit de réfléchir. J'ai su pendant le voyage de la présidence [bulgare] à Sofia (qui a eu lieu les 11 et 12 janvier, NDLR), que cela allait arriver. » Draft answers to Parliament, which the Ombudsman's inquiry team inspected, confirm this sequence of events.



	The DSG post is approved and vacancy notice published, with a deadline of 13 February.	
Thursday, 8 Feb 2018	The first candidate applies for DSG.	
Monday, 12 Feb 2018	<p>Mr Selmayr submits a note to the Consultative Committee on Appointments (CCA), informing it of his intention to apply and recuses himself and his Cabinet from the CCA.</p> <p>He submits a separate letter applying for DSG.</p> <p>The first candidate takes part in assessment by external HR consultant.</p>	
Tuesday, 13 Feb 2018	<p>The Director-General for Human Resources (HR), who is a permanent member of the CCA, informs the President about Mr Selmayr's application, his recusal from the CCA and the recusal of the other Cabinet members. Mr Juncker countersigns that note.</p> <p>CCA gets results of the first candidate's external assessment.</p>	
Wednesday, 14 Feb 2018	CCA issues preliminary opinion, that both candidates are suitable to be interviewed by the CCA.	
Thursday, 15 Feb 2018	Mr Selmayr takes part in the external assessment.	
Friday, 16 Feb 2018	CCA interviews Mr Selmayr, and concludes that he is a suitable shortlist candidate.	
Tuesday, 20 Feb 2018		<b>Lunchtime</b> President Juncker informs First Vice-President Timmermans of Mr Italianer's retirement and his intention to propose Mr Selmayr as SG to the College the next day. Mr Timmermans agrees.



	<p><b>14:58</b> The first candidate writes to the CCA and withdraws.</p> <p><b>Between 14:58 and 18:10</b> The four relevant members of the CCA sign the CCA opinion shortlisting Mr Selmayr for the position of DSG.</p> <p><b>18:30</b> President Juncker and Commissioner Oettinger together interview Mr Selmayr for the position of DSG.</p> <p><b>20:04</b> The President's Cabinet informs DG HR of the President's decision to nominate Mr Selmayr as DSG.</p>	<p><b>13:23</b> The Directorate-General for HR is informed of this proposal and starts drafting a note for the College meeting, that Mr Italianer will retire and the President proposes to appoint Mr Selmayr as SG. The document already refers to Mr Selmayr as a "<i>Deputy Secretary-General</i>". The document was last modified at <b>14:45</b>.</p> <p>Before the interview of President Juncker and Commissioner Oettinger with Mr Selmayr for the position of DSG, Commissioner Oettinger is informed of the resignation of Mr Italianer and gives his agreement to the President's proposal to appoint Mr Selmayr as SG.</p>
<b>21 Feb 2018</b>	<p><b>9:35</b> The 2244th College meeting starts.</p> <ul style="list-style-type: none"><li>- Mr Selmayr is appointed <b>Deputy Secretary-General</b></li></ul>	<p><b>8:39</b> Mr Italianer sends his resignation letter to President Juncker.</p> <ul style="list-style-type: none"><li>- Mr Italianer announces his retirement to the College.</li><li>- Mr Selmayr is appointed <b>Secretary-General</b></li></ul>



### 3) Procedural steps in the inquiry

**8.** On 5 May 2018, following the Resolution of Parliament, the Ombudsman wrote to the Commission stating she had opened an inquiry into the matter. In order to avoid duplication of work, she said she would consider that the answers already provided by the Commission to Parliament constituted the Commission's final position on those matters, unless the Commission informed her otherwise. She also stated that she would conduct her inquiry under the independent mandate given to the Ombudsman through the EU Treaties<sup>12</sup>.

**9.** As a first step, the Ombudsman put **seven questions** to the Commission which replied on 15 June 2018<sup>13</sup>.

**10.** In parallel, the Ombudsman informed the Commission that she required access to all documents, dating from 1 September 2017 until 18 April 2018 (the date of the Parliament resolution), relating to the appointment of the new Secretary-General. For the avoidance of doubt, the Ombudsman stated that this requirement covered documents sent from Commissioners to their Cabinets, documents within and between Cabinets, as well as documents between Commissioners/Cabinets and the Commission services, and should include all documents relating to the retirement of the previous Secretary-General, the appointment of a new Deputy Secretary-General and the appointment of the new Secretary-General.

**11.** The inspection of these documents began on 6 June 2018. The Commission gave the Ombudsman access to **two folders** of documents. One folder contained the file relating to the appointment of Mr Selmayr as Deputy Secretary-General, the other contained the minutes of the meetings of the chefs de cabinet of 19 February 2018 and the minutes of the meeting of the Commission of 21 February 2018. It also contained several email exchanges between the Commission's spokespersons and several journalists.

**12.** The Ombudsman then clarified in writing the much broader scope of the documentation required, and the Commission stated that it would review its files. The inspection recommenced on 21 June 2018 and, in all, involved twelve separate inspection days. The Ombudsman's staff inspected **15 additional folders** provided by the Commission's Directorate-General for Human Resources and **two folders** from the Commission's Legal Service. **The inspection covered between 8,500<sup>14</sup> and 11,000<sup>15</sup> pages in total.** This large volume is partly explained by the fact that the files included numerous

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<sup>12</sup> The letter opening cases 488/2018/KR and 514/2018/KR on the European Commission's appointment of a new Secretary-General is available here:

<https://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/94714/html.bookmark>

<sup>13</sup> The reply from the European Commission to the European Ombudsman concerning the Commission's appointment of a new Secretary-General (Joint inquiry into complaints 488/2018/KR and 514/2018/KR) is available here:

<https://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/97356/html.bookmark>

<sup>14</sup> The Ombudsman's estimate.

<sup>15</sup> The Commission's estimate.



preliminary drafts of the Commission's answers to Parliament's questionnaires<sup>16</sup>.

**13.** Apart from the file on the appointment of Mr Selmayr as Deputy Secretary-General, which contains documents dating from 31 January 2018 until late February 2018, all of the documents inspected date from after 21 February 2018, the day that Mr Italianer submitted his retirement letter and the day also on which the Commission appointed Mr Selmayr to replace him.

**14.** During the inspection, the Ombudsman asked the Commission to confirm that details of the documents she required had been given to the relevant Commission services and Cabinets, and that all documents received from these services and Cabinets had been brought to the Ombudsman's attention<sup>17</sup>. The Commission gave this confirmation.

**15.** The documentation inspected by the Ombudsman included a number of email exchanges with journalists. The Ombudsman is aware of public statements by other journalists that they also exchanged emails with the Commission's Spokesperson's Service relating to the appointment of Mr Selmayr as Secretary-General. The Ombudsman asked the Commission for copies of these additional exchanges. The Commission informed the Ombudsman that it had contacted its Spokesperson's Service but had been told that copies of the emails in question could not be found<sup>18</sup>.

## 4) Structure of the Commission services

**16.** The Commission is organised into departments called "*Directorates-General*", each with responsibility for a different policy area, such as competition, agriculture, trade or energy. Each Directorate-General is under the political supervision of one or more Commissioners, who, in conjunction with the College of Commissioners, decide on the policies of the Commission. Overall responsibility for the implementation of the policies of the Commission is entrusted, within each Directorate-General, to its Director-General.

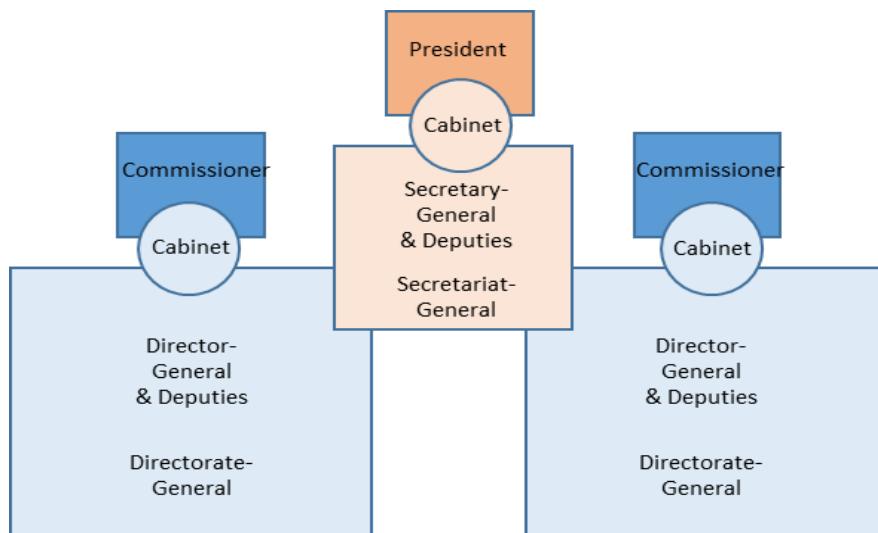
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<sup>16</sup> The Ombudsman's inspection report is available here:

<https://www.ombudsman.europa.eu/cases/correspondence.faces/en/99793/html.bookmark>

<sup>17</sup> To the extent that this correspondence was also copied to the Directorate-General for Human Resources and/or the Legal Service, these documents include correspondence between and within the Cabinets.

<sup>18</sup> These include: 1) emails between a journalist working with *Le Soir* (a major Belgian newspaper) and the Commission's Spokesperson's Service relating to an interview the journalist had with Mr Selmayr on 21 February (where, according to the journalist, he stated that Mr Italianer had confirmed, in early January 2018, that he would certainly retire in March 2018 (see paragraph 43 below), and 2) an email to several journalists sent on 5 March 2018 by the Spokesperson's Service confirming that the second candidate had withdrawn its candidacy in the recruitment procedure for the position of Deputy Secretary-General.



**17.** The Secretariat-General of the Commission is a specialised Directorate-General that operates under the political guidance of the President of the Commission. While it has a particular responsibility to the President, it has a responsibility also to the entire Commission as it is responsible for the overall coherence and coordination of the Commission's work<sup>19</sup>. The Secretariat-General is headed by the "*Secretary-General*", who has the rank of a Director-General. As the Secretary-General acts as a 'first among equals', he or she is considered to be the most senior *permanent* civil servant within the Commission. As the Commission pointed out in its replies to Parliament, "*the Secretary-General of the Commission is not an ordinary job*"; it requires "*special experience*" regarding the functioning of the Commission, its working methods, decision-making processes and inter-institutional role<sup>20</sup>. Clearly, the role of the Secretary-General of the Commission is a central one within the entire EU civil service.

**18.** Each Commissioner is assisted by a private office ("Cabinet"). Cabinets consist of the Head of Cabinet, a deputy Head of Cabinet, advisors and administrative staff<sup>21</sup>. In contrast to the posts of officials working in the civil service, Cabinet posts are limited to the duration of the five-year mandate of the Commission. The Head of Cabinet of the President plays a key role as he or she advises the President and speaks directly for him or her, and in that context is involved in many important decision-making processes (including those relating to the appointment of senior managers).

**19.** The fundamental difference between staff in the Commission's civil service and in Cabinets is that Cabinet staff are **personal appointees**, whose employment and administrative status is linked to their Commissioner's term of office. Staff in the Commission's services, on the contrary, are appointed on

<sup>19</sup> Article 20 of the Rules of Procedure of the Commission, C (2000) 3614, OJ 2000 L 308 (consolidated version), available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02000Q3614-20111116&from=EN>

<sup>20</sup> Reply to Parliament, Question 1, 4 April 2018.

<sup>21</sup> Communication to the European Commission, Rules governing the composition of the Cabinets of the Members of the Commission and of the Spokesperson's Service, 1 November 2014, available here: <http://ec.europa.eu/transparency/regdoc/rep/3/2014/EN/3-2014-9002-EN-F1-1.Pdf>



the basis of competitions. They are employed mostly on a permanent basis but many also on temporary contracts. They must have the independence necessary to serve any possible Commission throughout their careers but can be and are "*seconded*" to a Cabinet. This was the case with Mr Selmayr who, as a civil servant, was seconded to the President's Cabinet. Previous Secretaries-General had also served in Cabinets including in those of Commission Presidents.



## 5) Appointment of Commission senior officials

**20.** The selection and appointment of EU civil servants is governed by the Staff Regulations<sup>22</sup>. They set out two “*types of posts*” occupied by senior officials:

- Directors (grades AD14/15);
- Directors-General (grades AD15/16);

The post of Secretary-General is a Director-General post type.

**21.** The Commission’s ‘Senior Officials Policy’<sup>23</sup> sets out certain general principles governing the appointment of senior officials. Merit and competence relevant to the function are the main criteria for appointment: candidates may be appointed as senior managers only following a merit-based comparison of eligible staff<sup>24</sup>.

**22.** The Senior Officials Policy goes on to state that “[a]s a general rule vacant senior official posts must be published” as this provides for “*the best guarantee*” of finding the most suitable candidates for a post in a transparent manner. It also allows all eligible officials the opportunity to apply<sup>25</sup>.

**23.** Senior management appointments are made by the College of Commissioners. However, certain individual Commissioners have, before the College decides on appointments, important roles in the appointment process. Appointments are based on a proposal of the Commissioner for Human Resources (HR). For that proposal to proceed, the agreement of the President must be obtained. Before giving his or her agreement, the President must consult with the Commissioner(s) and Vice-President(s) who are responsible for the policy area where the successful candidate will work<sup>26</sup>.

**24.** An advisory committee, called the Consultative Committee on Appointments (CCA) has an important preparatory role in the appointment process. Its role is to evaluate and interview candidates and, on that basis, recommend a shortlist of suitable candidates to the Commissioners responsible for proposing appointments (see Annex I). For appointment procedures relating to Deputy Director-General posts, **the CCA consists of the following members**<sup>27</sup>:

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<sup>22</sup> Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community and the European Atomic Energy Community, OJ 1962 P 045 (consolidated version), hereafter ‘EU Staff Regulations’, available here: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A01962R0031-20140501>

<sup>23</sup> Compilation Document on Senior Officials Policy (hereafter ‘Senior Officials Policy’), available here: [https://ec.europa.eu/info/sites/info/files/compilation-of-the-senior-official-policy-at-the-european-commission\\_en.pdf](https://ec.europa.eu/info/sites/info/files/compilation-of-the-senior-official-policy-at-the-european-commission_en.pdf)

<sup>24</sup> Senior Officials Policy, p. 2.

<sup>25</sup> Senior Officials Policy, p. 3.

<sup>26</sup> Communication à la Commission relative aux méthodes de travail de la Commission, C(2014) 9004, 11 November 2014, p. 7, available here: [https://ec.europa.eu/info/sites/info/files/the\\_working\\_methods\\_of\\_the\\_european\\_commission\\_2014-2019\\_november2014\\_en.pdf](https://ec.europa.eu/info/sites/info/files/the_working_methods_of_the_european_commission_2014-2019_november2014_en.pdf).

<sup>27</sup> Article 3 of Commission Decision of 07.02.2007 laying down the rules of procedure for the Consultative Committee on Appointments (hereafter ‘CCA rules of procedure’).



1. Secretary-General (chair);
2. Director-General of the recruiting Directorate-General;
3. Director-General for HR;
4. Head of Cabinet of President;
5. Head of Cabinet of Commissioner for HR;
6. Permanent Rapporteur (currently a Director in Directorate-General for HR); and
7. Rapporteur for the case (designated by the Secretary-General from a list of Rapporteurs<sup>28</sup> comprised of existing senior managers).

**25.** Where the post in question is the post of Deputy Secretary-General, the number of persons on the CCA is reduced from seven to six, since the Secretary-General is also the Director-General of the recruiting Directorate-General<sup>29</sup>.

**26.** The Senior Officials Policy states that the shortlists adopted by the CCA “should in any event offer the Commissioners a *satisfactory choice of candidates*. The responsible Commissioners need on the one hand to have the widest choice of suitably qualified candidates and on the other to have a list of candidates for interview which does not impose on them a major burden of comparative assessment of a large number of candidates”<sup>30</sup>.

### **Reassignments**

**27.** The Commission, in its replies to Parliament, maintains that it can also “reassign” an official with his or her post - without any need to publish a vacancy, without any need to identify candidates, and without any need to compare candidates<sup>31</sup>.

**28.** The EU courts have established rules on the use of “*reassignments with post*”. Reassignments with post are based on the concept of “*equivalence*”. The Ombudsman believes it would be legally highly problematic to use a reassignment to move a person from one “*type of post*” to a **higher** “*type of post*”, as this would most likely breach the principle of equivalence (see Annex II for a technical description of this concept).

**29.** In its replies to Parliament, the Commission notes that the previous three Secretaries-General – Mr David O’Sullivan, Ms Catherine Day and Mr

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<sup>28</sup> Article 7 of the CCA rules of procedure.

<sup>29</sup> For the position of a Deputy Secretary-General, the Secretary-General and the Commission President “must have reached, on the basis of the CCA opinion, an agreement on the applicant to be put forward for appointment”, see Senior Officials Policy, p. 10.

<sup>30</sup> Senior Officials Policy, p. 9 (emphasis added).

<sup>31</sup> Answer to Question 1, 4 April 2018.



Alexander Italianer - were all reassigned to the function of Secretary-General<sup>32</sup>. However, as the Parliament has pointed out, all three already held and exercised the function of a Director-General in their basic careers before being reassigned to the function of Secretary-General.

**30.** In contrast, in January 2018, Mr Selmayr was the equivalent of a Director and not a Director-General (his post was that of a "*principal advisor*")<sup>33</sup>. Mr Selmayr could not rely on the higher grade and rank he held **in the Cabinet** of the President to make that jump, since grades and rank held **in a Cabinet** do not count in an official's progress in his or her **basic career**. This is not only legally highly problematic, but as the Commission confirmed to Parliament, not its practice. This meant that if Mr Selmayr was to become Secretary-General, by reassignment, he had first to be appointed to a Director-General equivalent post such as that of Deputy Secretary-General.

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<sup>32</sup> Answer to Parliament, Question 60, 24 March 2018.

<sup>33</sup> The Ombudsman notes that Mr Selmayr was appointed a "*principal advisor*" in the Directorate-General for Economic and Financial Affairs in July 2014, to represent the Commission at the European Board for Reconstruction and Development in London. The relevant vacancy notice states had the appointee would have responsibility "*for around four members of staff*". As Mr Selmayr was seconded to the President's Cabinet at exactly the same time, he never actually worked as a principal advisor for the Commission.



## 6) The appointments of Martin Selmayr

**31.** The Commission told Parliament that President Juncker and his then Head of Cabinet had made several attempts to convince Mr Italianer to continue as Secretary-General. The Commission stated that there had been “*discussions and reflections*”<sup>34</sup> on Mr Italianer’s succession between the President, Mr Selmayr and Mr Italianer from the second half of 2017 and in more detail as of early 2018<sup>35</sup>. In early 2018, Mr Italianer confirmed that he would abide by his decision to retire<sup>36</sup> and, according to the Commission, the transfer of Mr Selmayr to the position of Secretary-General became “*one possible option*”<sup>37</sup>.

**32.** In an interview with a Belgian newspaper on the day he was appointed Secretary-General, Mr Selmayr was reported to have stated that President Juncker had encouraged him, in early January 2018, to work towards the option of assuming the responsibility of becoming Secretary-General<sup>38</sup>. The journalist in question has reportedly stated that Mr Selmayr’s comments were “*on the record*”<sup>39</sup>.

**33.** It is possible however from the documentation inspected to identify the steps taken that ultimately led to Mr Selmayr becoming Secretary-General. It is clear that preparatory steps were taken **from mid-January to 21 February 2018** that facilitated Mr Selmayr’s appointment as Secretary-General. The fact that such preparatory steps were taken, and the precise manner in which they were taken, raise specific concerns.

### i) The preparatory steps

**34.** The Deputy Secretary-General vacancy was created through a decision to reassign an incumbent Deputy Secretary-General, Ms Paraskevi Michou, to the post of Director-General in the Directorate-General for Migration and Home Affairs. That decision was taken on 31 January 2018. However, as the decision states that the reassignment of Ms Michou would take effect on 1 March 2018, the vacancy for a Deputy Secretary-General was not due to arise until that date.

**35.** There was nothing incorrect with this reassignment in itself. However, the appointment of Ms Michou was unusual as it concerned an appointment of a

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<sup>34</sup> Answer to Question 11, 4 April 2018.

<sup>35</sup> Answer to Question 20, 4 April 2018.

<sup>36</sup> Answer to Question 32, 24 March 2018.

<sup>37</sup> Answer to Question 11, 4 April 2018.

<sup>38</sup> The sequence of events as described by Mr Selmayr in his interview with *Le Soir* on 21 February was reflected in an initial draft of the answers to Parliament. The original draft reply to Question 20 (second questionnaire) detailed that President Juncker had approached Mr Selmayr before Christmas 2017 about the likelihood of Mr Italianer’s retirement and had asked him to reflect on the option of his replacement. The draft states that when, in early January, Mr Italianer confirmed his intention to retire on 31 March 2018 , “*President Juncker during the Bulgarian Presidency of the EU visit of the College (11-12 January) encouraged Mr Selmayr to work towards the option of assuming this responsibility*”. That draft reply was originally drafted by the Spokesperson’s Service. However, this draft text, which reflects the statements made by Mr Selmayr himself to *Le Soir* on 21 February, was redacted by the President’s Cabinet before the replies were sent to Parliament.

<sup>39</sup> See also paragraph 15.



Director-General to a portfolio under the joint responsibility of a Commissioner **of the same nationality** (both Ms Michou and Commissioner Avramopoulos are Greek). The Commission, as a general rule<sup>40</sup>, does not appoint Directors-General to a portfolio under the responsibility of a Commissioner **of the same nationality**. The Ombudsman has checked the Commission's records **and found that in the last 14 years** more than 100 Director-General appointments were made but none where the newly appointed Director-General was of the same nationality as the relevant Commissioner<sup>41</sup>.

**36.** More importantly, the timing of Ms Michou's appointment is also noteworthy. It was approved by the College of Commissioners on 31 January 2018, three weeks before the adoption of the periodical mobility exercise on 21 February 2018 and four weeks before the appointment was due to take effect. There is no convincing explanation as to why the decision needed to be taken on 31 January, and not on 21 February<sup>42</sup>. A number of other appointments decided upon on 21 February took effect on 1 March. It is not clear why it was therefore necessary to announce the transfer of Ms Michou on 31 January, when the appointment would not take effect until March. But moving the appointment forward did have one major implication; it allowed the appointment procedure for the vacated Deputy Secretary-General post to start on 31 January 2018. This gave Mr Selmayr time to apply, for the evaluation process and interviews to be completed, and for Mr Selmayr then to be appointed Deputy Secretary-General at the College meeting of 21 February 2018, just before Mr Italianer officially announced that he would retire.

**37.** The proposal to transfer Ms Michou - before being brought to the College meeting - required the approval of the President. The Commission has told the Ombudsman that this approval would normally be given, **at a meeting with the President's Cabinet**, in advance of the College meeting. However, the Commission has said that no minutes or attendance record exist of the relevant meeting with the President's Cabinet.

**38.** As neither Mr Selmayr, nor any of the President's Cabinet, formally recused themselves from this decision-making process, it must be assumed that the Cabinet was part of the decision-making process leading to the transfer of Ms Michou thus creating a vacancy for a Deputy Secretary-General post.

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<sup>40</sup> Senior Officials Policy, p. 13, Point 9.1.

<sup>41</sup> There are four cases where a Commissioner was appointed to a portfolio which was **already** under the responsibility of a Director-General of the same nationality. The Commission took steps, where necessary, to move the Director-General. In one other case, the Commission was involved in the appointment of a Director-General outside the Commission, at the inter-institutional publications office, OPOCE, when that Director-General was of the same nationality as the Commissioner with responsibility for that matter. However, that case cannot be deemed to be comparable to the case of Ms Michou since OPOCE is not part of the Commission (it is an inter-institutional body) and the other main institutions, the Council and Parliament, also had to give their approval for that appointment. The Ombudsman has a complete list of the appointments in question on her file.

<sup>42</sup> During the College meeting, Mr Oettinger stated that Ms Michou was expected to immediately assume responsibility for the work on reform of the European asylum system, in view of the upcoming European Council in June (PV(2018) 2241 final, p. 12). The Ombudsman does not consider this explanation to be convincing. To be convincing, it would have to be the case that Ms Michou took up her new post soon after 31 January. However, Ms Michou did not take up the new post until 1 March 2018.



**39.** On 31 January 2018, the College approved the publication of the vacancy notice for the position of Deputy Secretary-General. The Ombudsman understands that in advance of this, the normal approval circuit for the proposal was followed. In the case of a position within the Secretariat-General, the final step in the approval circuit for a vacancy notice involves the President's Cabinet. This means that the President's Cabinet, then headed by Mr Selmayr, was involved in the preparation and approval of the vacancy notice for Deputy Secretary-General in the week preceding 31 January 2018.

**40.** Despite the absence of any recusals regarding this decision-making process, Mr Selmayr 12 days later applied for the vacant post along with another senior member of the President's Cabinet. Nobody else applied.

### **Article 11a of the Staff Regulations**

**41.** In general, a candidate should not be involved, in any form or **at any stage**, in the preparations or organisation of a selection procedure in which he or she may be an applicant. This is not only a principle of good administration, it is also a principle of law<sup>43</sup>. Article 11a of the Staff Regulations states that:

*"1. An official shall not, in the performance of his duties and save as hereinafter provided, deal with a matter in which, directly or indirectly, he has any personal interest such as to impair his independence, and, in particular, family and financial interests.*

*2. Any official to whom it falls, in the performance of his duties, to deal with a matter referred to above shall immediately inform the Appointing Authority. The Appointing Authority shall take any appropriate measure, and may in particular relieve the official from responsibility in this matter. "*

**42.** It is clear that Mr Selmayr and/or other members of the President's Cabinet were involved in the decision-making process that led to 1) the creation of the vacancy for a Deputy Secretary-General and 2) the approval of the vacancy notice for the post of Deputy Secretary-General for which Mr Selmayr (and another senior member of the President's Cabinet) later applied. This created, **at the very least**, a risk of a conflict of interests.

**43.** The Ombudsman therefore takes the view that Mr Selmayr's recusal from the selection procedure, made on 12 February, came too late and was unavoidable at that stage in any event. To avoid any risk of a conflict of interests, Mr Selmayr should, as early as January 2018, have recused himself, and perhaps the President's Cabinet over which he had hierarchical control, from any involvement in the relevant decision-making processes.

**44.** As, in early January 2018, President Juncker had apparently encouraged Mr Selmayr to take an interest in becoming Secretary-General, and as Mr Selmayr was aware of the importance of becoming Deputy Secretary-General in order to

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<sup>43</sup> See, by analogy, Case T-292/15, *Vakakis kai Synergates - Symvoulois gia Agrotiki Anaptixi AE Meleton v. European Commission* ECLI:EU:T:2018:103, para. 98.



enable his reassignment to the post of Secretary-General, any involvement by Mr Selmayr in any of the arrangements to fill the posts of Deputy Secretary-General or Secretary-General would inevitably be problematic. However, even if Mr Selmayr had not decided to apply for the position of Deputy Secretary-General before his application on 12 February, the Commission should have taken appropriate measures once Mr Selmayr had applied for the post to avoid any risk of a conflict of interests. Having noted that Mr Selmayr had not recused himself from the relevant decision-making processes, it should have re-launched the selection procedure without the involvement of the President's Cabinet. The fact that the Commission did not take such steps constitutes **maladministration**.

## **ii) Deputy Secretary-General appointment**

**45.** The CCA for the appointment of a Deputy Secretary-General comprises six persons (see paragraph 25). One is the “*rappoiteur*” chosen from a list of “*senior managers*” in the Commission. On 8 February 2018, the Chair of the CCA, Secretary-General Italianer, chose the Director-General for Communication to be rapporteur to the advisory procedure for the position of Deputy Secretary-General.

**46.** On the same day, the first application was received from a candidate (the “*first candidate*”), a senior member of the President’s Cabinet.

**47.** As Head of Cabinet of the President, Mr Selmayr was a member of the CCA. On 12 February, Mr Selmayr recused himself from participating in the CCA’s involvement in this appointment procedure stating that he intended to apply for the position himself. He also stated that, in view of his current post and his role as a permanent member of the CCA, it would be essential to avoid the “*appearance of any potential conflict of interest*”. He therefore asked the Directorate-General for HR to take the appropriate measures to ensure that the procedure be carried out without his involvement or the involvement of any person over whom he had hierarchical authority (that is, other members of the President’s Cabinet). The reason he recused the other members of the President’s Cabinet, as disclosed in Commission documents inspected, was that the independence of these possible replacements would be compromised in a procedure involving their own direct hierarchical superior. However, the Ombudsman considers that this recusal came too late and was hardly a decision he could have avoided.

**48.** On the same day, 12 February 2018, Mr Selmayr applied for the position of Deputy Secretary-General. In its replies sent to Parliament, the Commission stated that Mr Selmayr applied for the post of Deputy Secretary-General in order to ensure that his transfer as Secretary-General “*would be in line not only with the law, but also with Commission practice*”<sup>44</sup>. This statement itself indicates that he participated in the selection procedure for Deputy Secretary-General for the sole purpose of becoming eligible for reassignment as Secretary-General.

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<sup>44</sup> Answer to Parliament, Question 11, 4 April 2018.



**49.** Also on 12 February the first candidate took part in a day-long assessment conducted by an outside HR consultant<sup>45</sup>.

**50.** On 13 February, the Director-General for HR informed President Juncker of Mr Selmayr's application and that he could not therefore take part in the CCA. The Director-General for HR agreed with the suggestion of Mr Selmayr that the Directorate-General for HR would take "*whatever measures are necessary and appropriate in order to ensure that the various steps in this procedure can be carried out without [Mr Selmayr's] involvement or that of any other member of staff in the President's Cabinet*". She proposed that "*all correspondence relating to this selection procedure, which would normally either be addressed to your Head of Cabinet or require his agreement, is sent directly to your personal attention and for your personal agreement*". The note was counter-signed, conveying his agreement, by the President. Accordingly, by 13 February 2018 at the latest, the President knew that his Head of Cabinet was applying for the post of Deputy Secretary-General.

**51.** The recusal of Mr Selmayr and his Cabinet colleagues meant that there were now only five members on the CCA.

**52.** On 14 February 2018, the CCA, basing itself on the applications of the two candidates, issued its "*preliminary opinion*" in which it took the view that both candidates should be called for interview.

**53.** On 15 February 2018, Mr Selmayr took part in the day-long assessment by the outside consultant (which is a good practice other EU institutions could examine). Also on that day, a note was circulated to the members of the CCA, setting the dates and times of the CCA interviews with Mr Selmayr (8:00 on 16 February) and the first candidate (18:00 on 20 February). The note also set the time for adopting the CCA's opinion (18:45 on 20 February).

**54.** On 16 February, the CCA interviewed Mr Selmayr and concluded that he was a suitable candidate to be shortlisted. The Head of Cabinet of the Commissioner for HR, who is a permanent member of the CCA, was not present at the interview<sup>46</sup>. This meant that he could no longer be involved in the procedure, as CCA members need to be present in all relevant interviews if they are to compare the candidates' merits. This brought the number of remaining CCA members to four, the minimum number required for a quorum.

**55.** On 20 February 2018, over lunch on the day before the relevant College meeting, President Juncker informed First Vice-President Timmermans about Mr Italianer's decision to retire and his (President's) intention to propose the appointment by the College of Mr Selmayr as the new Secretary-General. Mr Timmermans agreed to this proposal. There are indications that Mr

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<sup>45</sup> The Assessment Centre "comprises individual and/or group exercises as well as in-depth interviews focussed on management skills", see [Senior Officials Policy](#), point 5.2.6.

<sup>46</sup> The Ombudsman has been unable to ascertain why the Head of Cabinet of the Commissioner for Human Resources could not attend the interview.



Timmermans was not made aware, in that meeting, of any procedural complexities involving the appointment of Mr Selmayr as Secretary-General<sup>47</sup>.

**56.** On 20 February 2018, the relevant Head of Unit at the Directorate-General for HR, received an oral instruction regarding the proposal to appoint Mr Selmayr as Secretary-General. The Head of Unit created a Word document on “*administrative matters*”, at 13:23 on that day. That document would serve as a briefing note for the College meeting that was due to take place the next morning. Importantly, the document expressly mentions the retirement of Mr Italianer as Secretary-General. It also states that the President proposes, **in agreement with Commissioner Oettinger**, to transfer Mr Selmayr to the post of Secretary-General as of 1 March 2018. The document does not describe Mr Selmayr as a principal advisor, or as a Head of Cabinet. Rather, **it describes him as a “Deputy Secretary-General”**. The document was last modified at 14:45 on 20 February 2018.

**57.** At 14:58, on 20 February 2018, the first candidate, who was due to be interviewed by the CCA at 18:00, sent an email to the Permanent Rapporteur of the CCA formally withdrawing her application for the post of Deputy Secretary-General<sup>48</sup>.

**58.** It was **after** the formal withdrawal of the first candidate that the relevant Head of Unit at the Directorate-General for HR asked the four members of the CCA, who had interviewed Mr Selmayr, to sign the draft CCA opinion, which then became the definitive CCA opinion. The then Secretary-General, Mr Italianer, was the last CCA member to sign the opinion, at approximately 18:10. With that final signature, the opinion of the CCA was formally adopted.

**59.** At 18:30 on the evening before the College meeting, President Juncker and Commissioner Oettinger jointly interviewed Mr Selmayr for the position of Deputy Secretary-General. Before that interview, President Juncker informed Commissioner Oettinger of the retirement of Mr Italianer and his intention to propose to the College the nomination of Mr Selmayr as the new Secretary-General<sup>49</sup>.

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<sup>47</sup> These indications derive from declarations made by Mr Timmermans' Head of Cabinet in the context of the preparation of the responses to Parliament's questionnaires.

<sup>48</sup> There are indications in the file that the Head of Unit concerned had information, earlier in the day, that the first candidate would not be interviewed that evening (the Head of Unit responded to the outside consultant, who was due to assist at the interview with the first candidate at 18:00, indicating that it was unsure if the interview would take place and that he would be contacted later to confirm). The Head of Unit wrote to the outside consultant after 15:00 to inform him that the interview, due to take place at 18:00, was now cancelled. The Head of Unit also included a reference to the withdrawal of the first candidate in the draft CCA opinion last modified at 9:40 on 20 February 2018.

<sup>49</sup> The European Commission's MEMO on the Appointment of the Secretary-General of the European Commission – Questions and Answers, 27 February 2018, p. 2, refers to the fact that Mr Oettinger was informed **before** the interview with Mr Selmayr. The Ombudsman notes that the Commission's answers to Parliament leave out this precise timing; it simply informed Parliament that Mr Oettinger was informed on 20 February, see, for example, answer to Question 11, 4 April 2018. The use of the more general timing, in the response to Parliament, arose because a member of the Commission's Legal Service recognised, when commenting on a draft, that it would be “*un peu délicat*” to state, in the responses to Parliament that Mr Oettinger knew of the proposal to appoint of Mr Selmayr as Secretary-General before the interview. The wording used in the response to Parliament is not, strictly speaking, untrue. It is correct that Mr Oettinger did know, on 20 February, of the proposal to appoint Mr Selmayr as Secretary-General. But, the statement is not the whole truth. This is confirmed by the Ombudsman's inspection. The



**60.** At 20:04, on 20 February 2018, a senior member of the President's Cabinet, the same person who had earlier withdrawn her candidature for the position, informed the Directorate-General for HR by email, that after interviewing Mr Selmayr jointly with Mr Oettinger, the President proposed to nominate Mr Selmayr to the function of Deputy Secretary-General. On the basis of that email, the Directorate-General for HR finalised a document with its proposals to appoint a series of senior managers.

**61.** On the morning of the College meeting, Wednesday, 21 February, at 8:39, Mr Italianer sent an email to President Juncker attaching a formal letter stating that he wished to step down as Secretary-General on 1 March, and to retire definitively on 31 March 2018<sup>50</sup>.

**62.** The College meeting started at 9:35. The retirement of Mr Italianer was not included on the written meeting agenda distributed in advance, and neither obviously the intended appointment of a new Secretary General. It appears that no Commissioners, other than Mr Juncker, Mr Timmermans and Mr Oettinger, knew that this issue would arise in the meeting.

**63.** During the meeting, Mr Oettinger, announced the proposal to appoint a series of senior managers, including Mr Selmayr as Deputy Secretary-General. All of these proposals were adopted by the College. Given the short duration of the meeting (49 minutes) and the various other points on the agenda including a discussion on the EU budget and a conference in Africa, any discussions on individual appointments on that list must have been very limited. As outlined further below, the College then went on to approve the appointment of Mr Selmayr as Secretary-General.

### Composition of the advisory committee (CCA)

**64.** For appointment procedures for Deputy Secretaries-General, the CCA consists of **six senior Commission staff**, including the President's Head of Cabinet and the Secretary-General. The Ombudsman notes that all of these senior staff members work closely together, would know each other well and very often also know the candidates.

**65.** Article 10 of the CCA Rules of Procedure states that a CCA member, with a **personal interest such as to impair his or her independence in a specific matter dealt with by the CCA**, shall neither take part in the deliberations nor vote on that matter. In such cases, the rules require that the member in question

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document drafted by the Directorate-General for Human Resources between 13:23 and 14:45 on 20 February 2018 expressly states that the President had the **agreement** of Mr Oettinger for the transfer of Mr Selmayr to the position of Secretary-General. Thus, it is clear that Mr Oettinger knew of the proposed appointment of Mr Selmayr as Secretary-General before the interview with Mr Selmayr (indeed, he had given his approval for that appointment).

<sup>50</sup> No reason for this timing of his retirement has been ascertained from the Commission documents inspected.



*“shall be replaced by a Rapporteur designated by the Secretary-General among the members on the list of Rapporteurs”* (our emphasis)<sup>51</sup>.

**66.** Thus when, on 12 February 2018, Mr Selmayr recused himself from the selection procedure, and also recused all the other members of the President’s Cabinet, an alternate **should** have been appointed by Mr Italianer from the list of rapporteurs. However, no alternate was appointed. This meant that the number of people involved in the process was less than required by the rules, and a smaller pool of people contributed to the CCA’s opinion.

**67.** When the Ombudsman raised this issue with the Commission, it highlighted an update to Article 8 of the CCA rules agreed by the College in 2015<sup>52</sup>. However this update, allowing for the President’s Head of Cabinet to be replaced by a senior member of the Cabinet (for example if he was unable to attend), does not affect the requirement under Article 10.

**68.** The Ombudsman thus concludes that **the CCA was not composed in accordance with the relevant CCA Rules of Procedure**. The failure to follow the rules of the CCA constitutes **maladministration**.

## Purpose of the appointment procedure

**69.** Before all formal steps in the selection procedure for a Deputy Secretary-General were concluded, President Juncker had already discussed with First Vice-President Timmermans his intention to propose Mr Selmayr as Secretary-General. Shortly after this discussion, a staff member of the Directorate-General for HR drafted a briefing note for the next day’s College meeting. This note mentioned the retirement of Mr Italianer and stated that the President proposed, in agreement with Commissioner Oettinger, to transfer Mr Selmayr to the function of Secretary-General. This briefing note referred to Mr Selmayr, not as Head of Cabinet, but rather as Deputy Secretary-General.

**70.** Both the conversation between the President and the First-Vice President, and the drafting of the briefing note, took place:

- **before** the first candidate in the selection procedure for the position of Deputy Secretary-General had formally withdrawn her application;
- **before** the CCA signed its opinion shortlisting Mr Selmayr for the position of Deputy Secretary-General;
- **before** President Juncker and Commissioner Oettinger interviewed Mr Selmayr for the position of Deputy Secretary-General; and
- **before** the President communicated to the Directorate-General for HR his proposal that Mr Selmayr be appointed a Deputy Secretary-General.

<sup>51</sup> Article 10 of the CCA rules of procedure.

<sup>52</sup> Exception added to the CCA rules of procedure by the College of Commissioners in October 2015, PV(2015) 2141 final, 6 October 2015, p. 13.



**71.** The content of this briefing note, referring as it does to the decision to propose Mr Selmayr as Secretary-General, thus **pre-empts the opinion of the CCA, which was not finalised until several hours later.**

**72.** Given that the instruction to draft this note came either from a particular Director or from the Director-General for HR - both of whom were CCA members - it seems clear that at least one member of the CCA signed the CCA opinion in full knowledge of the fact that the opinion would no longer serve to achieve the appointment of a person who would actually serve as a Deputy Secretary-General.

**73.** It is also clear that the interview of Mr Selmayr by President Juncker and Commissioner Oettinger, for the position of Deputy Secretary-General, took place **after** the President had taken steps to propose Mr Selmayr as Secretary-General. **President Juncker and Commissioner Oettinger** interviewed and proposed Mr Selmayr for the position of Deputy Secretary-General in full knowledge of the fact that he would not serve in that role.

**74.** The Ombudsman takes the view that, at least from the point when President Juncker spoke to First Vice-President Timmermans, if not earlier, the selection procedure for a Deputy Secretary-General no longer served the purpose of filling the position of Deputy Secretary-General; rather its sole purpose was to make Mr Selmayr eligible for reassignment as Secretary-General.

**75.** Article 4 of the Staff Regulations states that "*no appointment or promotion shall be made for any purpose other than that of filling a vacant post as provided in these Staff Regulations*". The fact that the Commission went through with the selection procedure for a Deputy Secretary-General, in full knowledge (including at least some Commissioners) of the fact that it no longer served the purpose of filling that position, means the Commission did not use its powers correctly, and so constitutes **maladministration**<sup>53</sup>.

### **iii) Secretary-General appointment**

**76.** Mr Italianer had informed President Juncker, at the time of his appointment in 2015, of his intention to retire as Secretary-General soon after March 2018. Mr Italianer confirmed this intention in January 2018<sup>54</sup>. The Commission told Parliament that the President did not share the January 2018 information with anyone else, except with his Head of Cabinet, so as "*not to undermine Mr Italianer's authority while he was in office*"<sup>55</sup>.

**77.** The 'Senior Officials Policy' provides that an appointment procedure under Article 29(1) or (2) of the Staff Regulations "*begins as soon as it is clear that a*

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<sup>53</sup> For an example of a misuse of power in the context of recruitment procedures, see, for example, Case C-105-75, *Franco Giuffrida v Council of the European Communities* [1976] ECLI:EU:C:1976:128.

<sup>54</sup> Answer to Question 32, 24 March 2018.

<sup>55</sup> Answer to Question 32, 24 March 2018.



*vacancy will arise in the foreseeable future, e.g. when an official signals his intention to retire*" (our emphasis)<sup>56</sup>. This means that a selection procedure could have been launched in early 2018, once Mr Italianer had definitively signalled his intention to retire.

**78. Even if** Mr Italianer's retirement plans had not been known until 20 February 2018 (which was not the case), there was still sufficient time<sup>57</sup> to complete a selection procedure under Article 29 of the EU Staff Regulations for the position of Secretary-General **before** Mr Italianer retired on 31 March 2018.

**79.** The Ombudsman is not convinced by the Commission's justifications for using the "*reassignment with post*" approach under which the merits of eligible staff would not be assessed<sup>58</sup>. There was no obvious urgency in deciding on the appointment of a new Secretary-General on 21 February 2018. Neither are there grounds for assuming that the launch of a selection procedure would have led to any disruption in the Commission's work. The Ombudsman finds that the creation of a time constraint was entirely artificial and that this constitutes **maladministration**.

**80.** The Ombudsman also cannot identify any valid reasons for the secrecy surrounding Mr Italianer's impending retirement. This information was, initially, kept between three people, Mr Juncker, Mr Italianer and Mr Selmayr. On the face of it, this situation appears to have allowed the putting in place of arrangements, in good time, to ensure that Mr Selmayr would become eligible to be reassigned as Secretary-General. The fact that the impending retirement of Mr Italianer was not put on the agenda of a College meeting, deprived Commissioners of the opportunity, collectively, to reflect on the issue.

**81.** Immediately following the appointment of Mr Selmayr as Deputy Secretary-General at the College meeting on 21 February, Mr Italianer told the College that he would retire. Mr Juncker then proposed that Mr Selmayr should replace Mr Italianer and the College agreed without any reported objections.

**82.** The Ombudsman notes that part of the Commission reasoning for the appointment is problematic. The minutes of the College meeting refer to Mr Selmayr's "*remarkable contribution ... to [Mr Juncker] as a candidate and President of the Commission*" (emphasis added). While Mr Juncker may have been grateful for this contribution, this cannot constitute a basis for the College of Commissioners to appoint Mr Selmayr to the post of Secretary-General, which is a post in the civil service. The reasons for filling such a post must be related to the "*interests of the service*" - and not the interests of a political candidate. It is of course important that the Commission President should have trust in, and

<sup>56</sup> Senior Officials Policy, p. 7, point 5.2.1.

<sup>57</sup> The inspection has revealed that a vacancy procedure can be completed in 21 calendar days (in the case of the vacancy notice for the post of Deputy Secretary-General, the procedure was completed in 21 days, from 31 March until 21 February).

<sup>58</sup> The Commission argued, in its replies to Parliament, that "*important functions such as the ones of Secretary-General [to] become vacant are to be avoided, in order to guarantee the seamless exercise of these functions*". Therefore, "*when it became clear that Mr Italianer did not want to continue exercising this function, the Commission had to act without delay, taking account of the important internal and external challenges the EU is facing in this particular moment in time*", Answer to Parliament, Question 1, 4 April 2018.



some degree of personal empathy with, a Secretary-General but in this case there was an inappropriate blurring of the line between administrative independence and political closeness.

**83.** At 10:30 on 21 February 2018, the Commission President and the Commissioner for HR announced to the press that Mr Selmayr would become Secretary-General.



## 7) Wider context to the appointments

### i) Relationship between Commission cabinets and services

**84.** The Commission has described “the political level” as the Commissioners who - as politicians - exercise political judgement in pursuing the Commission’s political priorities within the framework of the Treaties. The Commission as a whole is accountable to the European Parliament. In the preparation of policies and in the performance of tasks, Commissioners are assisted both by staff in the civil service and in their Cabinets. The Staff Regulations apply both to the civil service and the Commissioners’ Cabinets and include the obligation that staff “*shall carry out [their] duties and conduct [themselves] solely with the interests of the Union in mind. [...]*”<sup>59</sup>.

**85.** The Commission has published guidance which says: “*A close personal relationship based on trust and the mutual provision of information must be established between each Member of the Commission and the Director(s)-General concerned. The Member of the Commission issues General guidelines or gives instructions to the Director-General, in accordance with the College’s priorities. The Director-General, for his/her part, advises the Member of the Commission on the files relating to his/her portfolio and informs him/her of any subjects of relevance to the implementation of the priorities or the management of his/her services. He/she is accountable to the Member of the Commission and the College for proper implementation*”<sup>60</sup>.

**86.** One of the tasks of the Secretary-General is to “*assist the President so that, in the context of the political guidelines laid down by the President, the Commission achieves the priorities that it has set.*” The Secretary-General also ensures that the Commissioners are fully informed of the progress made on internal and inter-institutional procedures<sup>61</sup>. To fulfil this function effectively, the Secretary-General needs to be trusted by the President and other Commissioners, and by the civil service. For this trust to be maintained, the Secretary-General needs to be recognised as having legitimacy by both political and civil service sides of the Commission.

**87.** The Secretary-General also assists the President in “*preparing the proceedings and conducting the meetings of the Commission*”<sup>62</sup>. Commissioners meet normally on Wednesdays, and these meetings are prepared for on Tuesdays by the Commissioners’ Heads of Cabinet under the chairmanship of the Secretary-General.

**88.** The President’s Cabinet may meet several times per week whenever it is considered necessary by the President’s Head of Cabinet. The Directors-General of Presidential services (including the Secretary-General), their Deputies and/or their assistants can be invited by the President’s Head of Cabinet to these Cabinet meetings.

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<sup>59</sup> See Article 11 of the EU Staff Regulations.

<sup>60</sup> [Communication à la Commission relative aux méthodes de travail de la Commission, C\(2014\) 9004, 11 November 2014 p.](#), Annex 4, point 1.3.

<sup>61</sup> Article 20 of the Commission’s rules of procedure.

<sup>62</sup> Article 20 of the Commission’s rules of procedure.



**89.** In response to a written query by the Ombudsman during the inquiry, the Commission did not confirm or deny that as of the beginning of 2018, the Secretary-General now frequently joins meetings of the President's Cabinet. Of course, it is a matter for the President to organise his/her own cabinet, and specify how they interact with the Secretary-General. However, the roles are distinct and should be kept so.

## **ii) Commission's interaction with journalists**

**90.** Apart from press conferences, where Commissioners answer questions directly, the Commission interacts with journalists through its Spokesperson's Service, which "*ensures political communication on behalf of the President and the entire Commission*"<sup>63</sup>. The Spokesperson's Service, whilst part of the Directorate-General for Communications, falls under the political authority of the Commission's President. The Spokesperson's Service organises daily press briefings in Brussels, which is nearly a unique practice among public administrations in the world.

**91.** When the President and the Commissioner for HR met the press on 21 February 2018, the Commission had yet to issue the minutes of the College meeting in which Mr Selmayr was appointed as Secretary-General. The unusual circumstances of this appointment, which consisted of two procedures, one involving Mr Selmayr being appointed Deputy Secretary-General and a second involving his immediate reassignment to the post of Secretary-General, were not immediately explained<sup>64</sup>. The lack of detail at the time of the announcement, coupled with the surprise<sup>65</sup> expressed by some Commissioners, contributed to a sense of public disquiet and unease about the procedure when, a number of days later, these facts became known.

**92.** Once journalists sought to find out more about this two-step process, the Spokesperson's Service became defensive, evasive and even somewhat combative. When asked during a press briefing, the week after the College meeting, about the number of candidates in the recruitment procedure for the Deputy Secretary-General post, the Commission Spokesperson's answer was not sufficiently clear. The Spokesperson answered, in the same press briefing, that there were 'several', 'less than four', 'more than one', and finally 'two' candidates. The Spokesperson then acknowledged that the exact number had been in the briefing notes all along<sup>66</sup>.

**93.** One issue initially highlighted in the media in relation to the appointment of the Secretary-General, was the assertion that allowances and administrative support for former Commissioners would be improved in connection with the appointment of the new Secretary-General. The first issue as regards allowances is, as the Commission pointed out, not within the competence of the

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<sup>63</sup> See Communication à la Commission relative aux méthodes de travail de la Commission, C(2014) 9004, 11 November 2014, p. 10.

<sup>64</sup> See: <http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=I150894>.

<sup>65</sup> The item had not been on the agenda for that morning's College meeting and most Commissioners were unaware of the proposal.

<sup>66</sup> See: <http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=I151643>.



Commission but is a matter for the Council of the EU. There was nothing in the documents inspected by the Ombudsman about allowances for former Commissioners. There were however discussions on administrative support to former Commissioners, as the Commission confirmed later to Parliament. In the documents inspected, the Ombudsman has found no evidence to suggest that the appointment of the Secretary-General is linked to possible changes to the administrative support of former Commissioners e.g. use of car pool, office space. The Commission Spokesperson's Service did not acknowledge that this issue had been discussed at a senior level (Heads of Cabinet-level), and that a draft Decision had indeed been prepared. The Legal Service had concerns about the draft Decision and it was taken no further. When the Commissioner for HR was given the floor in the European Parliament plenary he likened reports about improving the administrative support for former Commissioners to "fake news" an unfortunate phrase given its origins<sup>67</sup>.

**94.** Based on her overall analysis of the Commission's communication with journalists, the Ombudsman finds the information provided by the Commission to journalists in the days following the appointment of the new Secretary-General was not sufficiently clear and complete. However, it is also true that given the way in which the appointment was conducted, the spokespersons were placed in a very difficult situation in attempting to explain a problematic appointment.

**95.** Overall, the Commission's handling of the communications aspect of the appointments, ultimately further damaged public trust.

### **iii) Public Trust**

**96.** In opening this inquiry, the Ombudsman asked the Commission to reflect on how the appointment of its new Secretary-General may have damaged trust in the EU as a whole, given the widespread criticism of the manner in which the appointment was made.

**97.** The Commission answered that it does not believe that its actions have damaged citizens' trust. The Ombudsman finds that this reflexively defensive response portrays either an actual lack of self-awareness and understanding of the valid concerns raised or a wilful refusal to admit to them. In its Resolution, the European Parliament stated that it "*[r]egrets that the procedure for the appointment of the new Secretary-General of the European Commission on 21 February 2018 was conducted in a manner which aroused widespread irritation and disapproval in public opinion, among Members of the European Parliament and within the European civil service*". It furthermore noted "*that the result of this procedure constitutes a reputational risk not only for the European Commission but for all the European Union institutions*".

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<sup>67</sup> Commissioner Oettinger speaking in the European Parliament's plenary session on 12 March at the end of the debate on the "Integrity policy of the Commission, in particular the appointment of the EC Secretary-General".



**98.** It is thus regrettable that the Commission replied in the manner it did and did not take account of the extensive criticism from the European Parliament, from many EU civil servants themselves and contained in a wide array of national and international media reports.

**99.** European citizens are entitled to expect all EU institutions to follow the rule of law, in spirit and letter. Specifically, citizens justifiably expect the European Commission to be a role model in this regard. And indeed, in many ways the Commission does maintain very high standards in terms of transparency, ethics and the rule of law compared to many other public administrations. However, any failure to respect the rules, and the spirit of those rules, can give rise to accusations that the Commission uses its power in an arbitrary and self-serving way. In such circumstances, the Commission risks damaging its own legitimacy. Given the key role of the Commission in the EU's institutional architecture, and indeed in European integration, the wider legitimacy of the EU is also put at unnecessary risk.

**100.** If legitimate concerns are raised, people expect the Commission to reply without delay and to give answers which are correct and complete.



## 8) Conclusions

**101.** The Ombudsman has found **four instances of maladministration** by the Commission in her inquiry:

- 1) Failure to take appropriate measures to avoid the risk of a conflict of interests arising from the involvement of Mr Selmayr and/or other members of the President's Cabinet in the decision-making leading to the creation of the vacancy and the approval of the vacancy notice for Deputy Secretary-General (a vacancy for which Mr Selmayr highly likely knew he would apply and later did).
- 2) Failure to ensure that the composition of the Consultative Committee on Appointments (CCA), for the selection of a Deputy Secretary-General, was in accordance with Article 10 of the CCA Rules of Procedure.
- 3) Holding a selection procedure for a Deputy Secretary-General, which did not serve its stated purpose to fill the vacancy, but rather only to ensure that Mr Selmayr would be eligible for reassignment as Secretary-General.
- 4) As the impending retirement of Mr Italianer was kept secret, a situation of urgency to fill the post of Secretary-General was created artificially. Even then, this should not have prevented the Commission from launching a procedure to identify and evaluate possible candidates for Secretary-General before Mr Italianer would retire.

**102.** The Ombudsman wishes to highlight that an assessment of Mr Selmayr himself did not form any part of her inquiry. The Ombudsman understands that not only is he a competent EU official but one highly committed to the European Union. He is also someone who has earned and maintained the trust of President Juncker. It is however somewhat ironic that President Juncker was the first Commission President elected via the '*Spitzenkandidaten*' democratic process, assisted by Mr Selmayr. This transparent democratic process, whereby the Commission President is elected taking account of the results of the European Parliament elections is designed, in part, to counter false claims that the EU is run by unelected officials in Brussels.

**103.** As outlined above, many citizens, EU civil servants, journalists and MEPs felt unease in the weeks following the appointment of the Commission's new Secretary-General. The Ombudsman inquiry has had access to all relevant documents, as presented by the Commission. The Ombudsman conclusions following her inquiry are largely similar to those of the European Parliament as expressed in its Resolution of 18 April 2018. The Parliament expressed the view that the Commission's actions in this case had undermined public trust in the EU, that they ran contrary to the spirit of those requirements; and that the appointment of Mr Selmayr was a "*coup-like action which stretched and possibly even overstretched the limits of the law*". The Ombudsman agrees with Parliament that "*the tradition of non-publication has reached its limits insofar as it does not*



*correspond to modern standards of transparency, the Commission, the European Parliament and other EU institutions should abide".*

**104.** In making these findings of maladministration, the Ombudsman is conscious of the need to consider the senior appointment procedures in their entirety and not in a narrow way. The Ombudsman is also conscious that the Commission must be allowed some flexibility in the organisation of its own administration. However, the Commission's actions in this case go beyond the legitimate boundaries of flexibility. The Commission's actions involved a manipulation of the rules governing senior management appointments so as to convey the impression that the appointment procedures, in the case of Mr Selmayr, were applied correctly and that the outcome, in turn, was fair and correct. In fact, this was not the case and the entire affair, starting in January 2018, if not earlier, was arranged to ensure the appointment of Mr Selmayr as Secretary-General.

**105.** The Ombudsman also notes that responsibility for the maladministration in this case rests with the European Commission collectively. The Ombudsman, like Parliament, is disappointed that no individual Commissioner appears to have seriously questioned the manner in which the appointment of the Secretary-General was conducted. It seems extraordinary that in the course of a very short meeting, at which other business was also dealt with, that the College should have approved, successively, the appointment of Mr Selmayr, first as Deputy Secretary-General, and then as Secretary-General. And all of this in a context where the proposed appointment of a new Secretary-General was not on the meeting agenda and no background papers had been circulated.

**106.** The Ombudsman agrees with the European Parliament that "*appointments to high-level posts like Secretary General should be made independently of other appointments*". Indeed, the Commission itself, in its current Rules of Procedure, recognises that the post of Secretary-General is a separate post with its own specific functions.

**107.** The Ombudsman welcomes the Commission statement in response to her written questions that it "*stands ready to reassess, together with the other EU institutions, how the application of the rules and procedures can be improved in the future.*" The Ombudsman agrees with "*the need to ensure that senior management decisions adopted by the Commission do not become the object of negotiations between Member States and/or political parties. This could call into question, with regard to the Commission, the supranational spirit of the European Public Administration and the goal of having highly qualified senior managers.*" The Ombudsman also welcomes Commissioner Oettinger's proposal to organise an inter-institutional roundtable on this matter, and encourages all EU institutions to engage seriously with this initiative to the overall benefit of the EU administration.



## 9) Recommendation

On the basis of the inquiry into these complaints, the Ombudsman makes the following recommendation to the Commission:

**The Commission should develop a specific appointment procedure for its Secretary-General, separate from other senior appointments.**

- Such a procedure should include the publication of a vacancy notice and the placing of the appointment on the College agenda in a timely manner.
- The Consultative Committee on Appointments, for future appointments of the Secretary-General, should also be broadened to include members from outside the Commission.

The Commission and the complainants will be informed of this recommendation. In accordance with Article 3(6) of the Statute of the European Ombudsman, **the Commission shall send a detailed opinion by 4 December 2018.**

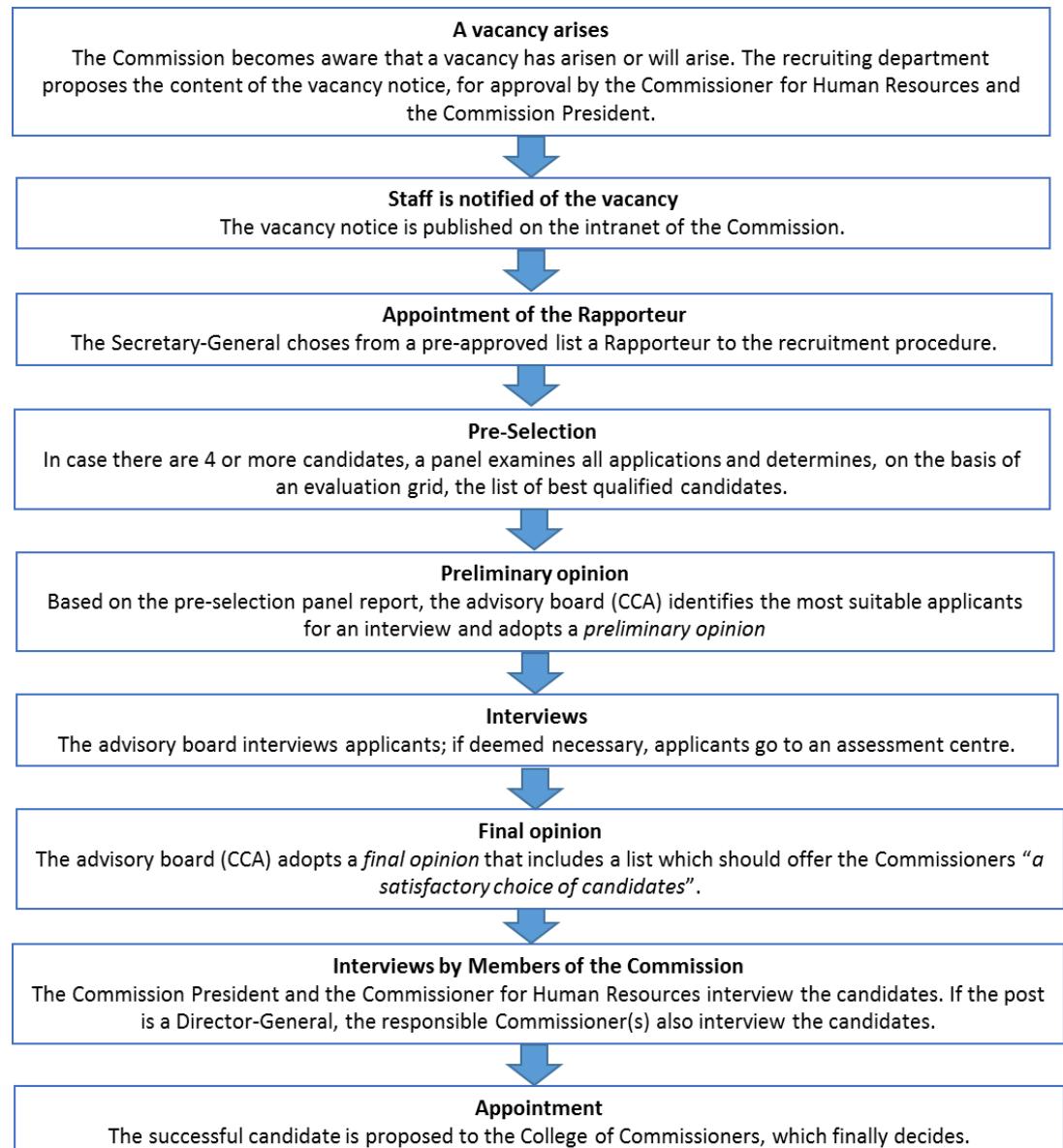
A handwritten signature in black ink, appearing to read "Emily O'Reilly".

Emily O'Reilly  
European Ombudsman

Strasbourg, 31/08/2018



## Annex I - Vacancy Procedures for Senior Commission Officials





## Annex II - Technical analysis - vacant posts, reassessments

This Annex seeks to clarify the concept of “*vacant post*” and the concept of “*reassignment with post*”.

### 1 Vacant posts

Article 4 of the Staff Regulations states that:

*“Vacant posts in an institution shall be notified to the staff of that institution once the appointing authority decides that the vacancy is to be filled.”*

Once a vacancy is notified to staff, an institution must compare the merits of the eligible candidates who apply for the vacancy, in order to decide, based on the selection criteria set out in the “*vacancy notice*”, which candidate is best suited to fill the vacancy.

A post certainly becomes “*vacant*” in an institution when the service of an official is terminated in accordance with Article 47 of the Staff Regulations, which includes the retirement of the official under Article 52 of the Staff Regulations.

The Commission argues the retirement of Mr Italianer did not give rise to a “*vacant post*”, because the post in question was filled immediately: it argues that since Mr Selmayr took up the function of Secretary-General *immediately* once Mr Italianer was transferred to an advisor role, that the post had not become “*vacant*”. It thus argues that there was no need to publish a vacancy notice for the post of Secretary-General.

A number of examples will illustrate why the words used by the Commission are somewhat misleading.

On 31 January, it was announced that Ms Michou, who at that time held the post of Deputy-Secretary-General, would, on 1 March, be transferred to the post of Director-General. The Commission then considered that a vacancy would arise, on 1 March, in the post of Deputy Secretary-General. It thus issued a vacancy notice, two candidates applied, and eventually, on 21 February Mr Selmayr was appointed to the vacant post of Deputy Secretary-General. The fact that there was no time-lapse between the departure of Ms Michou from the post of Deputy Secretary-General (she left that post on 1 March) and the appointment of Mr Selmayr to replace her (on 1 March) in that post, did not mean that a vacancy had not arisen in that post.

If it were the case that no vacancy had arisen in that post, it would not have been possible to issue a vacancy notice.

On 21 February, it was announced that Mr Italianer would be transferred, also on 1 March, to the post of Hors Classe Advisor (and that he would retire definitively on 31 March). From a technical perspective, there is no difference between the transfer of Ms Michou from the post of Deputy Secretary-General



to the post of Director-General, and the transfer of Mr Italianer from the post of Secretary-General to the post of an advisor. If the transfer of Ms Michou from the post of Deputy Secretary-General gave rise to a “vacancy” for the post of Deputy Secretary-General, certainly the transfer of Mr Italianer from the post of Secretary-General must also have given rise to a “vacancy” in the post of Secretary-General.

The fact that the vacancies thereby created might be immediately filled (that is, they are not *left* vacant for any period of time) does not mean that a vacancy had not arisen.

The Commission states in its replies to Parliament that “*since the appointment of Émile Noël as the Commission’s first Secretary-General the Secretary-General position has never been vacant*”<sup>68</sup>. The Ombudsman does not see the logic of this statement. Just because a post does not **remain** vacant, but is immediately filled once it becomes vacant, does not mean that the post was not rendered vacant by the departure of the incumbent. The Ombudsman’s staff also confirmed, during the inspection, that a vacancy notice was issued for the position of Secretary-General in 1997. Two candidates applied and Mr Carlo Trojan was appointed after a comparison of the merits of the two candidates. In that case also, there was no time period between the departure of the previous Secretary-General and Mr Trojan taking up this role.

In the Ombudsman’s view, the fact that a post is **directly** filled by a successor does not change the fact that it was “*vacant*”.

There is, however, a straightforward explanation for the above. As noted above, Article 4 of the Staff Regulations states that “*vacant posts in an institution shall be notified to staff of that institution once the appointing authority decides that the vacancy is to be filled*”. A proper reading of Article 4 implies that an appointing authority is not obliged to notify staff of every vacant post. It is obliged to do so only **once** it decides to fill that post.

An institution could well decide to wait before filling any vacant post.

It is also perfectly possible that when the institution decides to fill a given post that has been rendered vacant, it can use that particular post for another purpose. If a person retires from a “*Director-General-level*” post, the institution can use that post for another purpose, such as for a new Deputy Director-General. It can thus issue a vacancy notice to that effect.

It is also perfectly possible that the **function** that was carried out by the Director-General referred to in the previous paragraph could be given to another Director-General. In such cases, the person who is called upon to carry out the functions in question is understood to be “*reassigned with his/her post*” in order to carry out those functions.

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<sup>68</sup> Answer to Parliament, Question 5, 4 April 2018.



## Reassigning an official *with* his or her post

The Commission, in its replies to Parliament has referred to the possibility of “*reassigning*” an official *with* his or her post. It argues that when it reassigns an official with his or her post, there is no need to comply with the obligation, set out in Article 4 of the Staff Regulations, to issue a “*vacancy notice*”.

The Ombudsman notes that case law covers three main categories of “*reassignment with post*”, namely: 1) geographical reassessments; 2) reassessments when there is a serious and urgent need to move an official out of a job; and 3) a reorganisation of a service.

A geographical “*reassignment with post*” can be used where there is a need to move posts, and the persons occupying them, from one geographical location to another.<sup>69</sup> Such geographical “*assignments of posts*” can occur without any post becoming vacant in the location where the person is reassigned.

“*Reassignments with post*” can be used, very exceptionally, where there is a very serious and urgent need to move a member of staff **out of a specific job**, such as when a person occupying a managerial post is under investigation for fraud<sup>70</sup>, or where there is alleged harassment and it is necessary to take steps to protect the alleged victim. In those very serious and urgent cases, the institution is not required to have a vacancy before immediately “*reassigning*” the person concerned to another function. The vast majority of the case law relating to reassessments with posts concerns this type of reassignment, namely that a staff member is moved out of a job against his or her will, since in those cases the jobholder concerned contests the decision of the Appointing Authority in court.

“*Reassignments*” can also be used to carry out regular staff mobility exercises or reorganisations of a service. In such cases, staff are moved, **with their posts**.

The EU courts have, however, established rules as regards this use of “*reassignments with post*”<sup>71</sup>. If a staff mobility exercise involves moving a person to an **important function where specific skills are required**, and that function is **different from the function that person previously held**, and where the decision has **important and general effects**, the institution should put in place a “*procedure*” allowing it to identify the **most competent** person to carry out that function<sup>72</sup>.

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<sup>69</sup> The case law refers, for example, to situations where the posts of two secretaries working in the Delegation in Rome, and the persons occupying those posts ((Cases 161/80 and 162/80, *Carbognani and Code Zabetta v Commission*), were moved, back to Brussels.

<sup>70</sup> This arose in a case where OLAF was investigating alleged fraud at Eurostat. In that very serious and urgent situation, the Commission decided to move a number of managers implicated in the investigation to non-managerial functions. In order to achieve this aim quickly, it “reassigned” the posts of the persons in question to non-management functions). Once this reassignment with post was carried out, however, the Commission published the posts of Directors (see case T-339/03, *Clotuche v Commission* and Case T-118/04 and T-134/04, *Caló v Commission*)

<sup>71</sup> See, in particular, Case T-373/04, *Guggenheim v Cedefop*.

<sup>72</sup> If the new functions that arise from a reorganisation imply the same or lesser responsibilities than previously exercised by the reassigned official, it can be assumed that the official concerned has the capacities to exercise those new functions. In those circumstances, the simple reassignment can be used, without any need to carry out a procedure to identify the most capable candidate. This occurred in a



The appointment of a Secretary-General will have important and general effects.

At the very least, a director-level post, such as the one held by Mr Selmayr in his basic career until February 2018, is not **equivalent** (in terms of importance, in terms of responsibilities and in terms of the skills needed) to the post of a Secretary-General<sup>73</sup>.

Thus, it would not be consistent with the above outlined case-law to appoint a person who is at **director-level in his basic career**, to the post of Secretary-General, through a "*reassignment with post*", without any procedure to compare the merits of eligible staff with a view to identifying the most competent person.

Also the Commission, in its reply to the Ombudsman, now carefully qualifies its earlier statements to Parliament. Rather than insisting that Mr Selmayr was **always** eligible to be reassigned to the post of Secretary-General, it states that Mr Selmayr "*was fully qualified to be transferred to the Secretary-General post, after his appointment of Deputy Secretary-General, by a decision of the College under Article 7(1) of the EU Staff Regulations*" (emphasis added).

Annex I of the Staff Regulations establishes the **types of posts**<sup>74</sup> in each function group. Section 1 of Annex I reads:

1. Function group AD

Type of post	Grade range
Director-General <sup>75</sup>	AD 15 - AD 16

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case where a Head of Unit was reassigned to a non-managerial role (see *Fronia v Commission* at paragraph 56 and 57).

<sup>73</sup> It is arguable that there is **no post** in the Commission which is "*equivalent*", in terms of the skills required, to the post of Secretary-General. The Commission has stated to Parliament that the "*the Secretary-General of the Commission is not an ordinary job*". It is a job which "*requires not only special experience with regard to the functioning of the Commission, its working methods, its decision-making process and its interinstitutional role, but also a particular level of trust that the President can place in the Secretary-General*" and that there is "*only a handful of people at most who fulfil these special requirements.*" The Commission has also stated, in answering Parliament, that the function of Secretary-General **is not a normal function at Director-General-level**. It would thus seem consistent with the Court's ruling in *Guggenheim v Cedefop* for the Commission always to carry out a "procedure" to identify the most competent person to carry out that role. This would mean that **even Directors-General** would have to go through a procedure to identify the most competent person in order to become Secretary-General. However, for the purposes of the present inquiry, it is not necessary for the Ombudsman to arrive at a conclusion on this point since the only issue at stake here is whether Mr Selmayr could have been re-assigned from a **director-level post** to the Secretary-General post, which he clearly could not.

<sup>74</sup> The Commission has adopted a decision implementing Annex I which stipulates that there may be a Director-General or equivalent, and Directors or equivalent. This allows the Commission to appoint Deputy Director-Generals as a sub category within the Director-General Category, and principal advisors within the Director category.

<sup>75</sup> A Secretary-General is a Director-General "*type of post*".



Director	AD 14- AD 15
Advisor or equivalent	AD 13- AD 14
Head of Unit or equivalent	AD 9- AD 14
Administrator	AD 5 - AD 12

The five “*types of posts*” set out in Section 1 of Annex I of the Staff Regulations are significantly different from each other. Administrators have no management duties. Heads of Units manage administrators. Directors must have the ability to manage managers, which requires skills which are different from the skills required to be a Head of Unit. Directors-General must have the ability to manage Directors.

As a result, it is not possible to move a person up from one level to the next level through a simple “*reassignment with post*”. A “*procedure*” must instead be put in place allowing the institution to compare the merits of potential appointees and thus to identify the most competent person to carry out that function.



## Statement by Commissioner Günther H. Oettinger on the Recommendation by the European Ombudsman of 4 September 2018 on the European Commission's appointment of a new Secretary-General

Brussels, 4 September 2018

The European Commission has received the Recommendation by the Ombudsman on the appointment of the Secretary-General.

While we do not share all aspects of the underlying report, we welcome that the Ombudsman – based on a detailed analysis of some 11,000 pages provided to her – neither contests the legality of the appointment procedure of the Secretary-General, nor the choice of the candidate who is described as a "*competent EU official, highly committed to the European Union*".

On some aspects, where the Commission has a different factual assessment, we will provide further information to the Ombudsman in due course.

When it comes to the Recommendation of how the Secretary-General should be appointed in the future, at first glance we do not see any reason why the appointment of the Secretary-General should be carried out independently from the appointment of any other Director-General.

Having said this, the Commission will look into the Ombudsman's Recommendation and looks forward to reassessing, together with the European Parliament and the other Institutions, how the application of the current rules and procedures can be improved in the future and applied in the same manner to all Institutions. I have convened an inter-institutional round table which will take place on 25 September 2018, and I hope that these discussions will allow us to guarantee the excellence and independence of the EU civil service, working for the benefit and in the common interest of our citizens.

STATEMENT/18/5581

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